FINMARK CONSULTANTS PTE. LTD.

v.

DEVELOPMENT & COMMERCIAL BANK BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[SUIT NO. S6-22-172-90]
17 FEBRUARY 1993

CONTRACT: Defendant granting plaintiff option to purchase - Plaintiff attempting to exercise option - Defendant indicating inability to strictly fulfill terms of agreement - Whether there was an anticipatory breach of contract - Plaintiff not accepting breach but nevertheless failing to pay the required amount within the specified time - Effect - Plaintiff applying for specific performance of the agreement - Whether could be granted - Whether plaintiff entitled to damages for breach of contract.

The plaintiff and the defendant entered into an option agreement, with a sale and purchase agreement annexed thereto (the agreement), whereby the defendant agreed to sell and the plaintiff agreed to buy a piece of land for the sum of RM35 million. The option was to be exercised at the very latest by 27 November 1989 by the payment of RM3.5 million representing 10% of the purchase price. It was *inter alia* a term of the agreement that the completion date for the purchase was 30 December 1989.

The plaintiff attempted to tender the sum of RM3.5 million on 25 November 1989 but was informed that 2 caveats had been lodged on the land, the subject matter of the sale. The defendant indicated that it may not be in a position to complete by the completion date due to the existence of the caveats and the plaintiff concluded that the defendant was repudiating the agreement. The plaintiff refused to accept the repudiation but nevertheless failed to pay the sum of RM3.5 million to the defendant.

The plaintiff applied for specific performance of the agreement and for damages for breach of contract.

Held:

[1] There was no evidence to show that the defendant had breached the terms of the agreement. The caveats lodged on the land was not the act of the defendant and the defendant cannot be blamed for their entry. The defendant's solicitor's letter dated 25 November 1989 merely informed the plaintiff of the two caveats that had been lodged and did not amount to a repudiation of the agreement. Nowhere in the letter was it stated that the defendant was unwilling to abide by the agreement.

[2] In any event, the plaintiff, by its solicitor's letter dated 27 November 1989, had not accepted any repudiation of the agreement. In the event, the plaintiff must exercise the option before taking any other action to enforce its rights under the agreement. Clearly the defendant is not obliged to do anything until the option was exercised. Once the option was exercised, then it would be the defendant's duty to take steps to transfer the land to the plaintiff.

[3] The plaintiff's contention that the defendant has violated the agreement is without merit. It was mere speculation that the defendant would not be able to comply with the terms of the agreement. The removal of the two caveats was not difficult and it was mere conjecture that it may take too long for the defendant to do so. In the circumstances, it was premature for the plaintiff to conclude that the defendant had breached the agreement.

[4] The defendant's obligation under the sale and purchase agreement only begins once the plaintiff has exercised the option. As the plaintiff did not exercise the option, the action ought to be dismissed.

[Plaintiff's claim dismissed with costs].

[Ed. Note: The plaintiff appealed to the Supreme Court which allowed the appeal. The Supreme Court decision is reported at [1994] 3 CLJ 519**].**

Case referred to:
United Dominions v. Eagle Aircraft [1968] 1 AER 104 ***(foll)***

For the plaintiff - Wong Kim Fatt (H.W. Wong with him); M/s. T.H. Su & Co.
For the defendant - D.P. Naban; M/s. Skrine & Co.

JUDGMENT

Anuar Bin Dato' Zainal Abidin J:
By an agreement entered into between the plaintiff and the defendant on 29 August 1989, the defendant, in consideration of the plaintiff's paying to the defendant a sum of RM100,000, granted to the plaintiff an option to purchase or cause the purchase of all that piece of land known as Lot 413 held under State Title Lease 2875 in the Mukim of Tebrau District of Johor Bahru upon the terms and conditions set out in the sale and purchase agreement attached thereto at the purchase price of RM35 million.

It is an express term of the option agreement that the option period shall be for a period of 60 days commencing from 29 August 1989 and expiring at 5.00 p.m. on 27 October 1989.

It is a further term of the option agreement that the option period would be extended for a further period of 30 days from the date of expiry of the option period upon the plaintiff paying to the defendant a sum of RM50,000 seven days before the expiry of the option period.

It was agreed in the option agreement that the option may be exercised by the plaintiff before expiry of the option period or the extended option period.

On 29 August, 1989, the plaintiff paid to the defendant a sum of RM100,000. On 20 October 1989, the plaintiff paid to the defendant a sum of RM50,000 in consideration of which the option period was extended by the defendant to expire at 5.00 p.m. on 27 November 1989. Several proposals and counterclaims were exchanged between the plaintiff and the defendant to amend the terms of the option agreement and the sale and purchase agreement. It is not necessary for me to go into the details of the amendments.

By a letter dated 23 November 1989, the plaintiff's solicitor wrote to the defendant's solicitor informing the defendant that the plaintiff intended to exercise the option on the morrow 24 November 1989.

The plaintiff, however, did not turn up at the office of the defendant's solicitor as stated by the plaintiff's solicitor in their letter dated 23 November 1989.

On 25 November 1989, the plaintiff's solicitor, the representative of the intended purchaser and their solicitor attended the office of Messrs. Adnan, Sundra & Low at 11.00 a.m. with all the documents required under the option.

Before the plaintiff took steps to exercise the option the defendant's solicitor handed a letter dated 25 November 1989 informing the plaintiff that two caveats have been lodged on the land on 15 November 1989. The letter also informed the plaintiff that there was a possibility that the completion of the sale and purchase agreement might be delayed because of the two caveats. It further suggested that the sale and purchase agreement be amended to take into account the revised circumstances.

As a result, the plaintiff's solicitor left the defendant's solicitor's office without delivering or causing the delivery of the option documents.

On 27 November 1989, the plaintiff's solicitor together with the representative of the intending purchaser came to the defendant's solicitor's office. Again no attempt was made by the plaintiff's solicitor to exercise the option.

By a letter dated 27 November 1989, the plaintiff's solicitor wrote to the defendant's solicitor stating, among other things, that in view of what had happened, the plaintiff now concludes that the defendant has repudiated the above agreement.

It is to be noted that the plaintiff had proposed certain amendments to the sale and purchase agreement when it was informed that there were two caveats lodged on the land. The proposed amendments were not accepted or agreed to by the defendant. This was conveyed to them on 27 November 1989.

The plaintiff further informed the defendant that it does not accept the defendant's repudiation of the above agreement. In the plaintiff's solicitor's letter of 27 November 1989, it took a stand that the option shall remain in force until such time as the defendant has removed the caveats.

The first issue is whether the option was repudiated by the defendant by the issue of the letter dated 25 November 1989.

The second issue is whether the defendant was in fundamental breach of the express or implied terms of the option agreement.

The plaintiff's contention is that the defendant had fundamentally violated the rights of the plaintiff on 15 November 1989, when the two caveats were entered against the land. It is therefore futile for the plaintiff to exercise the option as its right to purchase the land had been fundamentally violated in that the defendant would not be able to transfer or convey the land on 30 December 1989. In the defendant's solicitor's letter dated 25 November 1989, the defendant stated that it could not perform beyond its ability in that if the caveats were still subsisting despite its efforts it would not be able to transfer the land in favour of the purchaser on the completion date by 30 December 1989. The plaintiff contended that in other words it is reasonable to conclude that the defendant at all material times was not able to complete on the original terms.

I am unable to follow the arguments of the plaintiff and cannot find any evidence to show that the defendant has breached the terms of the above agreement. As regards the two caveats lodged on 15 November 1989, it is not the act of the defendant and therefore the defendant cannot be blamed. The letter dated 25 November 1989, from the defendant's solicitor to the plaintiff's solicitor does not amount to a repudiation of the agreement. The letter merely informed the plaintiff of the two caveats which had been lodged recently. Nowhere in the letter is it stated that the defendant is not willing to abide by the option agreement.

In any event, as far as the plaintiff is concerned, it has never accepted any repudiation of the option agreement. By its letter dated 27 November 1989, the plaintiff made its stand clear that it regarded the option as still in force.

In the event, the plaintiff must exercise the option before taking any other action to enforce its rights under the agreement.

In *United Dominions v. Eagle Aircraft* [1968] 1 AER 104, at p. 109 Lord Diplock LJ said:

> A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future. This apart, a unilateral contract may never give rise to any obligation on the part of the promisor; it will only do so on the occurrence of the event specified in the contract, *viz*, the doing (or refraining from doing) by the promisee of a particular thing.

Clearly the defendant is not obliged to do anything until the option was exercised. Once the option was exercised then it would be the defendant's duty to take steps to transfer the land to the plaintiff.

The plaintiff's contention that the defendant has violated the agreement is without merit. It is mere speculation that the defendant would not be able to comply with the terms of the agreement. The removal of the two caveats is certainly not a difficult thing to do. It is mere

conjecture that it may take too long a time for the defendant to do so. In any event it is the responsibility of the defendant to transfer the land to the purchaser in accordance with the agreement. If the defendant is unable to comply with the terms of the agreement the plaintiff is given the right of remedy under Clause 8 of the sale and purchase agreement. It is premature for the plaintiff now to conclude that the defendant has breached the agreement.

The defendant's obligation under the sale and purchase agreement only begins once the plaintiff has exercised the option. As the plaintiff did not exercise the option the action ought to be dismissed.

For the above reasons I would dismiss the plaintiff's claim with costs.

The parties have agreed that the decision in this case will bind the parties in the case S6-24-188-90. As a consequential order I would allow the application Encl. (6) in S6-24-188-90.

There will be one set of costs only. Costs will be in respect of C.S. S6-22-172-90 only.